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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1081

DAVID W. BROWN, Private E-2, RA 11 979 464,

Petitioner,

—v.—

HON. ROBERT S. MCNAMARA, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; MAJOR GENERAL JOHN M. HIGHTOWER, Commanding General, U. S. Army Training Center, Infantry, U. S. Army, Fort Dix, New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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DAVID W. BROWN, Private E-2, RA 11 979 464,

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HON. ROBERT S. MCNAMARA, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; MAJOR GENERAL JOHN M. HIGHTOWER, Commanding General, U. S. Army Training Center, Infantry, U. S. Army, Fort Dix, New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 24, 1967.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, as yet unreported, is set out in the Appendix, *infra,* pp. 1a-8a. The amended opinion of the United States District Court for the District of New Jersey is reported at 263 F. Supp. 686, and is set out in the Appendix, *infra,* pp. 9a-23a.

Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit was entered on November 24, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Constitutional and Statutory Provisions Involved

The constitutional provisions involved in this case are the First, Fifth, and Sixth Amendments to the Constitution of the United States.

Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 App. U. S. C. ¶456(j), is set out in the Appendix, *infra,* pp. 24a-25a.

Department of Defense Directive (DOD) 1300.6, and Army Regulation (AR) 635-20 are set out in the Appendix, *infra,* pp. 26a-41a and pp. 42a-45a, respectively.

Questions Presented

1. Whether petitioner's application for discharge from the U. S. Army as a conscientious objector was arbitrarily denied.
2. Whether Department of Defense Directive 1300.6 and Army Regulation 635-20 violate the due process clause of the Fifth Amendment.

Statement of the Case

Petitioner is a private in the United States Army, having enlisted on May 17, 1966 for a period of three years. On June 28, 1966, after two weeks of basic training, petitioner, pursuant to Army Regulations (AR) 635-20,[1] submitted an application for discharge as a conscientious objector.[2] The application recited, among other personal data, that petitioner was a member of the Methodist Church, as were his parents, that he believed in a Supreme Being, and that his application for conscientious objector status was based on religious training and belief, as well as on "pacifist training." His application was supported by accompanying letters from John J. McCabe, the Assistant Methodist Chaplain at Yale where petitioner was a student prior to his enlistment; Arthur Brandenburg, Methodist Chaplain of the Wesley Foundation at Yale; Wallace T. Viets, Pastor of the First Methodist Church, New Haven, Conn.; Mrs. David W. Brown, his wife; and Mr. and Mrs. Richard W. Anderson, close friends of petitioner. The application was also accompanied, as required by AR 635-20(4)(c), by a statement by Stewart K. Lewis, Brigade Chaplain, which said that in his opinion, petitioner's "beliefs, though sincere, are based on contacts he has had with Pacifistic Organizations and individuals rather than on Religious Convictions" (A. 10a).[3]

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[1] The full text of AR 635-20 is set out in the Appendix, *infra*, pp. 42a-45a.

[2] Appellant had not applied to Selective Service for exemption as a conscientious objector prior to enlistment. Had he done so, he would have been ineligible under AR 635-20(3)(b).

[3] The symbol "A" refers to the printed Appendix filed in the court below which is part of the Record filed with this Petition for Certiorari.

Petitioner's entire application is set out at A. 2a-19a.

Following the procedure required by AR 635-20, petitioner's application proceeded through the chain of command: (1) His commanding officer recommended disapproval of the application because petitioner's beliefs are "mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs." The commanding officer based his opinion on the fact that "Brown has been subjected to reading numerous papers and pamphlets concerning the 'Pacifist Program' currently being demonstrated in his country" (A. 28a). (2) The Brigade Assistant Adjutant recommended disapproval of the application for discharge but did recommend that petitioner be reclassified I-A-O and transferred to non-combatant duty (A. 27a). (3) The Base Commanding General recommended disapproval on the ground that petitioner "does not meet the criteria for separation under the provisions of paragraph 4, AR 635-20"[4] (A. 26a). (4) The Commanding General, First Army, recommended disapproval "under the provisions of paragraph 3(b), AR 635-20"[5] (A. 25a). (5) The Adjutant-General, United States Army, denied the application. The denial recited that "The opinion of the Director of Selective Service that Private Brown would not be properly classified as I-O or I-A-O if he were being considered for induction at this time was considered in making this decision" (A. 24a). Peti-

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[4] Paragraph 4, entitled "Procedure," sets out the manner in which application is to be made and its contents.

[5] Paragraph 3(b) states that requests for discharge "will not be entertained when based solely on conscientious objection which existed, but which was not claimed prior to induction [or] enlistment . . . [or] when based solely on conscientious objection claimed and denied by Selective Service prior to induction." Petitioner made no such application to Selective Service prior to enlistment. He also asserts that his conscientious objection "crystallized" only after his enlistment (Complaint, para. 6).

tioner was notified of the rejection of his application on or about October 6, 1966.

On October 7, 1966, petitioner was ordered to draw combat training equipment. Compelled by his religious training and belief, petitioner refused to do so. On October 10, 1966 petitioner was charged with failure to obey a lawful order of a non-commissioned officer under Art. 91, Uniform Code of Military Justice (10 U. S. C. §891). On October 15, 1966, he was tried and convicted under that charge by a special court-martial and sentenced to three months confinement and forfeiture of $37.00 per month of his pay. Execution of the sentence was suspended the same day (Complaint, paras. 15-16).

On October 17, 1966, petitioner was again ordered to draw combat training equipment, he again refused, and he was again charged, this time for failure to obey a lawful order of a commissioned officer under Art. 90, U. C. M. J. (10 U. S. C. §890) (Complaint, para. 17). A pre-trial investigation was conducted under Art. 32, U. C. M. J., but a second court-martial was not recommended. However, the suspension of sentence adjudged by the first court-martial was vacated and petitioner entered confinement on November 16, 1966 (Complaint, para. 16).[6]

A petition for a writ of habeas corpus was filed on November 29, 1966 in the United States District Court, District of New Jersey, Civil 1186-66, alleging that petitioner was held in unlawful custody by the United States Army for the following reasons:

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[6] Subsequently, petitioner was charged with a third violation of Art. 90, U. C. M. J., convicted by general court-martial, and sentenced to eighteen months imprisonment. App. *infra*, p. 3a, footnote 2. Petitioner is presently serving that sentence.

(a) The denial of his application for discharge as a conscientious objector was in violation of 50 App. U. S. C. §456(j), Department of Defense Directive (DOD) 1300.6, and AR 635-20.

(b) The denial of his application for discharge as a conscientious objector was in violation of due process of law as required by the Fifth Amendment because it was arbitrary and without any basis in fact.

(c) The denial of his application for discharge was in violation of due process of law as required by the Fifth Amendment because he was never afforded a hearing and never advised of the grounds upon which his application for discharge was denied.

(d) The denial of his application for discharge was in violation of the equal protection of the laws as required by the Fifth Amendment in that individuals seeking to be recognized as conscientious objectors by the Selective Service System before entering the armed services are afforded hearing rights, and there is no rational basis for denying a hearing specifically or as a matter of course to individuals who become conscientious objectors only after entering the armed services.

An order to show cause was issued by the District Court on November 29, 1966 and argument on the application to issue the writ was heard on December 19, 1966. After argument, the District Judge, Hon. Arthur S. Lane, dismissed the petition with an opinion, later amended, holding that the federal courts were without jurisdiction to review the determination by the Army denying petitioner's applica-

tion for conscientious objector status and rejecting on the merits petitioner's claims regarding the procedural defects of the pertinent regulations.

On appeal to the United States Court of Appeals for the Third Circuit, Judges Van Dusen and Maris held that Federal courts have the power to review denial of applications for discharge from the armed forces by conscientious objectors. However, because Judge Van Dusen held that the denial in this case was not arbitrary or capricious, and because Chief Judge Staley concluded that the Court was without jurisdiction to review, the decision of the District Court was affirmed. Judge Maris would have reversed on the ground that "the military authorities made a basic error in concluding that the fact that Brown's pacifist beliefs were based on contacts with or influences made upon him by pacifist persons and organizations was evidence that they were necessarily not religious beliefs" (App., *infra*, p. 7a).

Reasons for Granting the Writ

This case presents the substantial question whether the denial of an application by a member of the armed forces for conscientious objector discharge, on the ground that the applicant's beliefs are based *in part* on allegedly non-religious pacifist readings and contacts, is for that reason arbitrary, without basis in fact, and in conflict with *United States* v. *Estep*, 327 U. S. 114 (1946), *United States* v. *Seeger*, 380 U. S. 163 (1965), and *Dickinson* v. *United States*, 346 U. S. 389 (1953).

A. The substantial concern this Court has demonstrated in ensuring that denials of claims for exemptions under the

Selective Service Law[7] not be based on mere "suspicion and speculation," *Dickinson* v. *United States, supra* at 397, has been made manifest in several instances by the granting of certiorari to review allegedly arbitrary selective service classifications. See, e.g., *Estep* v. *United States,* 327 U. S. 114 (1946); *Witmer* v. *United States,* 348 U. S. 375 (1955); *Dickinson* v. *United States, supra; United States* v. *Seeger, supra.*

Moreover, the ground on which the court below sustained the Army's denial of petitioner's application for discharge —that the beliefs underlying his opposition to military service were based in part on non-religious pacifist contacts —is in direct conflict with the ruling of this Court in *United States* v. *Seeger, supra* at 186, and the decision of the Court of Appeals for the Tenth Circuit in *Fleming* v. *United States,* 344 F. 2d 912, 915-916 (10th Cir. 1965). These cases hold that the fact that one's beliefs are based in part on non-religious principles does not preclude conscientious objector status.[8]

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[7] Petitioner agrees with the Court below on the applicability to this case of standards developed in Selective Service cases. See *Gilliam* v. *Reaves,* 263 F. Supp. 378, 384 (W. D. La. 1966). And see DOD 1300.6, the Department of Defense directive issued to insure "uniform procedures for the utilization of conscientious objectors in the armed forces and consideration of requests for discharge on the grounds of conscientious objection," which provides that the standards used by the Selective Service System in determining I-O or I-A-O classification of draft registrants prior to induction are considered appropriate for judging the conscientious objector claims of those who are already members of the armed forces. Part III (F), App., *infra,* pp. 28a-29a.

[8] The case at bar is also an example of the variance between the armed forces' standards for disposing of conscientious objector claims and the standards enunciated by this Court. See *N. Y. Times,* June 17, 1967, p. 13, col. 5. "Pentagon Scored Over Objectors," reproduced, *infra,* pp. 46a-48a.

B. Under the "basis in fact" test enunciated in *Estep* v. *United States, supra,* military authorities are not free, absent impeaching or contradictory evidence, to disbelieve the applicant's evidence. *Dickinson* v. *United States, supra* at 396. The courts are required to search the record for some "affirmative evidence" which is incompatible with the applicant's tender of proof of exemption. *Ibid.* To allow "suspicion and speculation" to serve as a basis for denial would be "contrary to the spirit of the [Selective Service] Act and foreign to our concepts of justice." *Id.* at 397.

Judging the denial of petitioner's application for conscientious objector discharge in light of this unambiguous standard, it becomes clear that the Army acted in an arbitrary manner and that its decision is unsupported by the requisite basis in fact. Petitioner satisfied each of the criteria necessary to secure conscientious objector status under AR 635-20, DOD 1300.6, and 50 U. S. C. App. §456(j). The government had conceded petitioner's sincere belief in a Supreme Being.[9] Thus, the sole remaining issue was whether petitioner's proof of religious training and belief was rebutted by *any* evidence. Cf. *Sicurella* v. *United States,* 348 U. S. 385, 388 (1955). No such countervailing evidence is to be found in the record. In the face of the copious and uncontroverted evidence submitted by petitioner, both the Army and the court below seized on the statements of the Brigade Chaplain and of the Commanding Officer that petitioner's beliefs were based, at least in part, on contacts with or influences made upon him by allegedly non-religious pacifist organizations.

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[9] The concession was made at the District Court Hearing hearing on the order to show cause. It appears at p. 26 of the transcript of that hearing. The transcript is not part of the Record here.

Under this Court's ruling in *Seeger*, statements concerning non-religious influences are not evidence with which the Army can properly satisfy the "basis in fact" test. *Seeger* held that a non-religious basis for opposition to military service may operate as a ground for denial of a claim to exemption only if it is the *exclusive* source of his conscientious objector beliefs. *United States* v. *Seeger, supra* at 186.[10] In *Fleming* v. *United States*, 344 F. 2d 912, 915-916 (10th Cir. 1965), the court properly read *Seeger* to exclude exemption only if the non-religious basis for the beliefs was the *sole* basis of the applicant's claim.

Equally important here, there is no warrant whatever for concluding that persons practicing pacifism or that pacifist organizations with which they are in contact are necessarily non-religious. As the dissenting opinion of Judge Maris in this case points out:

> ". . . it can hardly be denied that the pacifist position of opposition to war stems from the Divine commands not to kill but to love one's enemies and that through the centuries most of those who have taken the pacifist position have done so on the basis of their religious beliefs. Indeed recognition of this fact is the basis of the exemption from military service and training which is granted by the Selective Service Act to conscientious objectors. . . . It is true, of course, that there are pacifists who are motivated solely by political, sociological or philosophical views. But it is quite erroneous to

[10] Seeger's beliefs were found "to be based upon individual training and belief, both of which included research in religious and *cultural* fields." *Seeger* at 167 (Emphasis added).

> assume . . . that pacifist persons are necessarily not religiously motivated and that organizations supporting the pacifist position are necessarily organized and led by persons whose pacifist views stem from other than religious conviction, and to conclude from that assumption that the contacts with Brown and influences upon him by such persons and organizations did not involve religious grounds of opposition to war. On the contrary I believe it to be a fact that in this country most pacifists are religiously motivated, as the Seeger case defines such motivation, and that most organizations supporting the pacifist position are largely composed of and led by individuals so motivated.[11]

In *Seeger* this Court explicitly cautioned those who pass on conscientious objector applications to remember

> "that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight." *Seeger* at 184.

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[11] Compare a standard dictionary's definition of "pacifism":

> "Opposition to war or to the use of military force for any purpose; esp., an attitude of mind opposing all war, emphasizing the defects of military training and the cost of war, and advocating settlement of international disputes entirely by arbitration; also the system of beliefs or opinions opposing war or the use of military force." Webster's International Dictionary (2d Ed.).

Thus, the word "pacifism" is neutral. As a "system of beliefs," it may or may not be based upon religion—but to believe that it *ipso facto* excludes a foundation in religion is without any support whatever.

This admonition is no less applicable to the military, a point this Court is urged to make by granting petitioner's writ of certiorari.

C. The court below supported its finding that a basis in fact existed for the Army's determination by drawing

> "specific attention to . . . the full compliance of the Army with AR 635-20, to the requirements in DOD 1300.6 that claims will be recognized 'to the extent practicable and equitable' and that claims will not be entertained if the conscientious objector's beliefs existed prior to entering the Armed Forces, to the fact that Private Brown made his claims two weeks after beginning basic training (six weeks after enlisting) . . ." App., *infra*, p. 5a.

Obviously, these factors are not evidence in this case. They are merely restatements of the governing military standards about which petitioner has raised no question. Such conclusory statements cannot create a "basis in fact." The relevant point is that petitioner's uncontroverted evidence conclusively demonstrates that he has fully satisfied his burden with respect to these factors. Under these circumstances, petitioner's claim must be honored. *United States* v. *Seeger, supra; Witmer* v. *United States, supra.* See also, *Batterton* v. *United States,* 260 F. 2d 233 (8th Cir. 1958); *Pitts* v. *United States,* 217 F. 2d 590 (9th Cir. 1954); *Williams* v. *United States,* 216 F. 2d 350 (5th Cir. 1954).

D. The procedures established by AR 635-20 for the processing, evaluation and adjudication of applications for conscientious objector status are totally devoid of minimum standards of procedural due process and thereby violate the Fifth Amendment.

Military proceedings, whether criminal, civil, or administrative, are subject to essential Fifth Amendment procedural due process guarantees.[12] The courts have refused to defer to congressional acts or military regulations establishing procedures devoid of even the minimal protection of due process. "Military due process" is judged generally by the same criteria and under the same standards as "civilian due process." The general rule is summarized in *Unglesby* v. *Zimny*, 250 F. Supp. 714, 718 (N. D. Calif. 1965):

> "Although it is clear that Congress may set standards of military due process in view of military necessity, such standards as are adopted must conform to minimal requirements of constitutional due process."

The Fifth Amendment has consistently been applied to military discharge procedures. See *Bland* v. *Connally*, 293 F. 2d 852 (D. C. Cir. 1961) (right to confront adverse witnesses); *Davis* v. *Stahr*, 293 F. 2d 860 (D. C. Cir. 1961) (right to confrontation); cf. *Williams* v. *Zuckert*, 372 U. S. 765 (1963); *Harmon* v. *Brucker*, 355 U. S. 579 (1958) (Secretary of Army exceeded authority in considering preinduction activity of discharge); *Beard* v. *Stahr*, 370 U. S. 41 (1962) (particularly discussion in dissenting opinion of right to confrontation and cross-examination); *Reed* v. *Franke*, 297 F. 2d 17 (4th Cir. 1961) (post-discharge hearing satisfies due process).

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[12] The "essence of justice" has been described as "largely procedural", 1 Davis, *Administrative Law*, §7.20, p. 506 (1958), and the fairness of procedure as constituting "due process in the primary sense." *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681 (1930). See also *McNabb* v. *United States*, 318 U. S. 332, 347 (1943); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 179 (concurring opinion); *Shaughnessy* v. *Mezei*, 345 U. S. 206, 224 (1953) (dissenting opinion).

While one or more of the attributes of the basic elements of procedural due process may, upon good cause shown, be relaxed, the following have traditionally been held essential prerequisites to administrative determinations:

1. The right to present evidence (witnesses and documentary) and argument.

2. The right to be heard orally.

3. The right to rebut adverse evidence, through cross-examination and other appropriate means including the confrontation of adverse witnesses.

4. The right to appear with counsel.

5. The right to a reasoned decision based upon known evidence.

AR 635-20 provides only for the right to present some written evidence (the application form), and nothing else.[13] In the course of the consideration, processing, evaluation and determination of his application, petitioner was denied virtually every necessary ingredient of due process. A basic personal liberty is at issue, and no emergency or exigency exists which would justify abrogation of the right. Cf. *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306 (1908) (hearing provided after administrative action).

Finally, any attempted rationalization of the Army procedures based upon the amorphous "right-privilege" distinction is misplaced. The claimed status of conscientious objection surely amounts to more than a mere privilege. It has been recognized by Congress since the framing of the

[13] Except for the Chaplain's interview.

Constitution as a significant right, grounded in the tenets of the First Amendment's injunction against the interference with the free exercise of religion. See *United States* v. *Seeger, supra.* Termination of the statutory right to conscientious objection would present a grave constitutional question. Whether or not the free exercise clause requires congressional recognition of conscientious objector status, the right to procedural due process is not limited to constitutional rights. Due process protections attach as well to rights recognized by statute or administrative regulation. See, e.g., *Garner* v. *Los Angeles Bd. of Public Works,* 341 U. S. 716, 725 (1951) (concurring opinion); *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 894 (1961); *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100 (1947); *Homer* v. *Richmond,* 292 F. 2d 719, 722 (D. C. Cir. 1961).

Most important, the nature of the claim itself compels a hearing. The various subjective factors which AR 635-20 submits to official consideration in determining the validity of conscientious objector claims require logically that an opportunity be accorded to both sides to meet opposing arguments.[14]

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[14] DOD 1300.6 and AR 635-20 also fail to afford equal protection to conscientious objector claimants in the Army. Central to the discriminatory difference is the omission from AR 635-20 of the hearing rights which have proved critical for conscientious objector claimants within the Selective Service System. See 32 C. F. R. 1624-1627.

Due process forbids distinctions which are arbitrary and which do not embody a proper legislative or administrative purpose. See *Bolling* v. *Sharpe,* 347 U. S. 497 (1954); *Barbier* v. *Connolly,* 113 U. S. 27, 31-32 (1885); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78-79 (1911). There are no rational grounds to justify the denial of critical hearing rights to young men whose conscientious objections to war in any form crystallize when they are in the armed services.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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February 1968

APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16454

DAVID W. BROWN, PRIVATE E-2 RA 11 797 464,
Appellant,

v.

HON. ROBERT S. McNAMARA, SECRETARY OF DEFENSE;
HON. STANLEY R. RESOR, SECRETARY OF THE ARMY;
MAJOR GENERAL JOHN M. HIGHTOWER,
COMMANDING GENERAL, U. S. ARMY TRAINING CENTER,
INFANTRY, U. S. ARMY, FORT DIX, NEW JERSEY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued October 5, 1967

Before STALEY, *Chief Judge,* and MARIS and VAN DUSEN,
Circuit Judges

OPINION OF THE COURT

(Filed November 24, 1967)

By VAN DUSEN, *Circuit Judge*

This appeal concerns the jurisdiction of the Federal Courts over persons in the military service.[1] The case is before the court on appeal from an order of the District Court denying a petition for a writ of habeas corpus, requesting the discharge of appellant from the Army on the grounds of his being a conscientious objector. Appellant

1 The background of this case is set out in considerable detail in the able opinion of Judge Lane: *Brown v. McNamara,* 268 F. Supp. 686 (D. N. J. 1967).

(Private David W. Brown) voluntarily enlisted in the Army. The petition alleges that his religious beliefs "crystalized" two weeks after beginning his basic training at Fort Dix, New Jersey, and he refused to proceed further with combat training.

Army Regulations (AR 635-20) provided a procedure for people in Private Brown's position to request discharge from the Army on the grounds of conscientious objection. Private Brown submitted the required forms, together with the required documentation, and complied fully with the procedure, including the Chaplain's and psychiatrist's reports. This internal Army regulation was adopted pursuant to a Defense Department directive designed to establish uniform procedures in all branches of the Armed Services for considering discharge requests on the grounds of conscientious objection (DOD No. 1300.6). The administrative system contemplated by the Defense Department and enacted by the Army regulation is fairly detailed. But in general terms it provides for a "discretionary" discharge, consistent with the national policy of not inducting conscientious objectors. Since members of the Armed Forces are involved, however, such discharge requests will be recognized only "to the extent practicable and equitable." Certain guidelines and rules are given for exercising this discretion, including: the claimed objection cannot stem from beliefs existing before entering the Armed Forces; each service's headquarters will decide, after consideration of the peculiar circumstances of the case; great care should be used to insure the sincerity of the claim; the same standards used by the Selective Service System for pre-induction claims should be used (an advisory I-O classification from the Selective Service will be a normal prerequisite for discharge, particularly where the applicant has less than two years of service); and no absolute objective measurements can be applied across the board. The procedure suggested allows for assignment to non-combatant duties in certain cases and the Army regulations provide

for assignment to duties providing the minimum conflict with professed religious beliefs pending final decision on an application for discharge.

Private Brown's application did not receive a favorable advisory classification of I-O (or I-A-O allowing a non-combatant assignment) from the Director of Selective Service, despite several letters submitted on his behalf from outside sources attesting to his religious convictions. Both the Chaplain's report and the Commanding Officer's recommendation of disapproval made reference to Brown's contact with pacifist organizations and persons, and both concluded that his beliefs were based upon these contacts, as opposed to religious convictions. Based on this recommendation, the documents attached to the application, and the Selective Service opinion, the Adjutant General denied discharge and, accordingly, Private Brown was ordered to draw combat training equipment. Brown refused. After hearing by a Special Court Martial and suspension of his sentence by the reviewing officer, a second refusal to obey orders led to new charges. Instead of convening a second court martial, suspension of the original sentence of three months' confinement at hard labor was vacated and Brown was ordered into confinement.[2] The petition for a writ of habeas corpus followed, alleging that Brown was being held in violation of his rights. In general terms, appellant alleged that the Army violated its own procedure, made an incorrect determination of Brown's conscientious objector status, and followed an administrative procedure that denied Brown constitutionally required procedural and substantive due process, as well as equal protection of law.

The lower court denied any relief by way of habeas corpus, finding no constitutional infirmity in the adminis-

2 At oral argument, counsel for appellant indicated that Private Brown again refused to obey orders after his three-month sentence and thus incurred another court-martial sentence, 18 months at hard labor, to be served at Fort Leavenworth, Kansas. No good reason has been shown why transfer of petitioner-appellant Brown from Fort Dix should be restrained, as orally requested by his counsel at argument. It is noted that no written motion for such extra relief has been presented.

trative procedure used by the Army and no jurisdiction to review their factual determination under that procedure. We agree with the excellent opinion of Judge Lane on the issue of procedural due process.[3] Regardless of the constitutional underpinnings of the right to classification as a conscientious objector, it is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntarily enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life. We therefore affirm the conclusion "that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation." See *Brown v. McNamara, supra*, at 691.

Inherent in this conclusion and our approval is a decision that the Federal Courts have jurisdiction to make this review of procedural due process just as they would if the question were one of statutory construction. E. g., *Harmon v. Brucker*, 355 U. S. 579, 581-2 (1958).

We do not decide, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, we do not hold that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his active service. With this view of our jurisdiction, we reject the appellant's petition on the basis of our examination of this particular record.[4]

Whether or not our review of the question of substantive due process which may be presented in any case of a

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3 *Brown v. McNamara, supra.* We use the dichotomy of "procedural" and "substantive" due process in this case only to help emphasize what we do and do not decide on this appeal. We realize fully that the distinction is not always a clear line and may well break down under certain circumstances.

4 Such concerns as interference with the military are not irrelevant or necessarily of slight importance. See Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 197 (1962).

person voluntarily enlisted in military service is as broad as or limited to the "basis in fact test," *Estep v. United States*, 327 U. S. 114, 122-23 (1946); *United States v. Seeger*, 380 U. S. 163, 185 (1965), or whether an indispensable prerequisite to our exercise of jurisdiction is always the complete exhaustion of military remedies, *Gusik v. Schilder*, 340 U. S. 128 (1950),[5] we need not decide in this case.

The present record contains sufficient evidence to show that the Adjutant General's denial of discharge for reasons of conscientious objection was not arbitrary, or capricious, or irrational.[6] We draw specific attention to the advisory opinion of the Director of Selective Service, to the full compliance of the Army with AR 635-20, to the requirements in DOD 1300.6 that claims will be recognized "to the extent practicable and equitable" and that claims will not be entertained if the conscientious objector's beliefs existed prior to entering the Armed Forces, to the fact that Private Brown made his claim two weeks after beginning basic training (six weeks after enlisting), to the statement of the Brigade Chaplain that "I am of the opinion that his beliefs, though sincere, are based on contacts he has had with Paci-

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5 See, also, *Beard v. Stahr*, 370 U. S. 41 (1962). Claimed "conscientious objector" status can always be raised as a defense to prosecution for refusing to obey orders. From any judgment or sentence, comprehensive appeal is available. 10 U. S. C. §§ 817, 859-876. This includes resort to a board of review (10 U. S. C. § 866), to the Court of Military Appeals (10 U. S. C. § 867), to the Secretary of the Army (10 U. S. C. § 874), and petition for a new trial (10 U. S. C. § 873). Appellant has not pursued all these available remedies. On this record, we are unwilling to expand the principle of *Dombrowski v. Pfister*, 380 U. S. 479 (1965), in order to assure for appellant determination of any constitutional issues without exposure to court martial proceedings. See *Noyd v. McNamara*, 378 F. 2d 538, 540 (10th Cir. 1967). Counsel for appellant have referred us to the case of *United States v. Taylor*, No. CM413709 (Board of Review, U. S. Army, October 24, 1966), where conscientious objection was deemed no defense to a refusal to obey orders and thus evidence on the determination of a claim as a conscientious objector was held properly excluded. We do not have the record in this case and note that this case is not a determination by the highest Army appellate authority.

6 See *Burns v. Wilson*, 346 U. S. 137, 142-3 (1953), where the court noted in an analogous situation:

> "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."

fistic Organizations and individuals rather than on Religious Convictions," and to the opinion of the Commanding Officer that Private Brown's beliefs were "mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs."[7]

Such factors constitute a sufficient basis for the Army's decision within the guidelines of DOD 1300.6. In this posture, Private Brown's petition presents no claim sufficiently unique, nor does his position show such injustice, that we are compelled to interfere in whatever internal avenues of appeal are available to him within the Army.

For these reasons, the petitioner is not now entitled to a writ of habeas corpus and we will affirm the decision of the court below.

STALEY, *Chief Judge*, Concurring.

I concur in the affirmance of the district court's denial of the writ. I also agree with the majority opinion insofar as it affirms the finding of the district court that the administrative procedure used by the Army did not deny the appellant procedural due process. However, I agree with the district court's conclusion that federal courts should refuse to accept subject matter jurisdiction to pass on the

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7 It is noted that in his application for discharge, appellant included under "Pacifist Training": personal contact with professed pacifists, reading of literature from SANE and the World Federalists, contacts with peace groups at Yale, including "Alternative" and "Americans for Reappraisal of Far Eastern Policy," and reading the beginning of MacLuham: *Understanding Media: The Extension of Man*. Although, as stated above, we do not here decide the applicability of the "basis in fact" test to classification of enlistees after entering active service, this case does fulfil the requirements under the test suggested in *Dickinson v. United States*, 346 U. S. 389, 396 (1953), there being a showing that the Army's finding was supported by "some affirmative evidence," and the requirements suggested in *United States v. Seeger, supra*, at 179-80, since the record contains affirmative evidence that the appellant's opposition to military service was not "based on grounds that can fairly be said to be 'religious.'"

It is also noted that the Commanding Officer believed that "prior to his enlistment into military service, and since . . . [that time] Brown has been subjected to reading numerous papers and pamphlets concerning the 'Pacifist Program' currently being demonstrated in this country." As pointed out above, conscientious objector beliefs existing prior to entry into the Armed Forces are not grounds for discharge under AR 635-20.

factual adequacy of the Army's decision. 263 F.Supp. at 692-93. As stated in the opinion below, the exercise of such jurisdiction has properly been held to be unduly disruptive of the operation of the armed forces, and contrary to the doctrine of the separation of powers. Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953); Harmon v. Brucker, 243 F.2d 613, 619 (C.A.D.C., 1957) rev'd other grounds, 355 U.S. 579 (1958).

MARIS, *Circuit Judge,* concurring in part and dissenting in part.

I concur with the opinion of the court in holding that the federal courts have power to review the substantive elements of the military proceedings under which Brown was denied discharge from the Army as a conscientious objector. But I cannot agree that upon such review the denial of his discharge must be upheld. For I think that the military authorities made a basic error in concluding that the fact that Brown's pacifist beliefs were based on contacts with or influences made upon him by pacifist persons and organizations was evidence that they were necessarily not religious beliefs. Quite the contrary may very well have been the case. For it can hardly be denied that the pacifist position of opposition to war stems from the Divine commands not to kill but to love one's enemies and that through the centuries most of those who have taken the pacifist position have done so on the basis of their religious beliefs. Indeed recognition of this fact is the basis of the exemption from military service and training which is granted by the Selective Service Act to conscientious objectors. As to the broad meaning of religious belief in this connection see United States v. Seeger, 1965, 380 U.S. 163.

It is true, of course, that there are pacifists who are motivated solely by political, sociological or philosophical views. But it is quite erroneous to assume, as the military

authorities did in Brown's case, that pacifist persons are necessarily not religiously motivated and that organizations supporting the pacifist position are necessarily organized and led by persons whose pacifist views stem from other than religious conviction, and to conclude from that assumption that the contacts with Brown and influences upon him by such persons and organizations did not involve religious grounds of opposition to war. On the contrary I believe it to be a fact that in this country most pacifists are religiously motivated, as the Seeger case defines such motivation, and that most organizations supporting the pacifist position are largely composed of and led by individuals so motivated. The military authorities had before them no evidence as to the actual basis of the pacifist beliefs of the persons and organizations with which Brown was in contact or as to the nature of the views which they expressed to him. Since their erroneous assumption that these must necessarily have been non-religious infects the whole record and obviously influenced their decision, I would reverse.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Amended Opinion of the United States District Court, District of New Jersey

Civil No. 1186-66

DAVID W. BROWN, Private E-2, RA 11 797 464,

Petitioner,

v.

HON. ROBERT S. MCNAMARA, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; MAJOR GENERAL JOHN M. HIGHTOWER, Commanding General, U. S. Army Training Center, Infantry, U. S. Army, Fort Dix, New Jersey,

Respondents.

Appearances:

EMERSON L. DARNELL, Esquire,
Mount Holly, and

ELEANOR HOLMES NORTON, Esquire
(Pennsylvania and District
of Columbia Bars)
for Petitioner.

DAVID M. SATZ, JR., Esquire,
United States Attorney, by

WILBUR H. MATHESIUS,
Assistant United States Attorney,
for Respondents.

Amended Opinion of the U. S. District Court

LANE, *District Judge*:

On or about May 17, 1966, David W. Brown, just prior to his twenty-first birthday, enlisted in the United States Army for a period of three years. Private Brown was assigned to Fort Dix, New Jersey, for an eight-week basic Army combat training course. After completing two weeks of the course, it is alleged that Private Brown's thoughts crystallized to the point where he was compelled to conclude that by reason of his religious training and belief, he was unable to serve as a soldier in the United States Army. Brown informed his superior officers of this and refused to proceed further with combat training.

On June 28, 1966, Private Brown submitted a Personal Action Form (DA Form 1049) requesting a discharge pursuant to Department of Defense Directive (DOD) No. 1300.6 and Army Regulation (AR) No. 635-20. The Defense Department Directive was issued by the Secretary of Defense under his general power to control the Department of Defense, 10 U.S.C. § 133. The stated purpose of the directive was to establish "uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection." DOD 1300.6, pt. I. These procedures apply to "all personnel of the Army, Navy, Air Force and Marine Corps and to all Reserve components thereof." DOD 1300.6, pt. II.

Part III of the directive is headed "POLICY" and is composed of seven paragraphs lettered A. to G. The general content of this material is as follows: A. That an administrative discharge prior to completion of term of service is discretionary based on the facts of each case

and no one has a vested right to such a discharge. B. That consistent with the national policy of not inducting conscientious objectors (I-O classification) such claims will also be recognized when made by members of the Armed Forces to the extent practicable and equitable. C. That such claims will not be entertained if the conscientious objector's beliefs existed prior to his entering the armed forces. D. That final determination of the request should be made by the departmental headquarters of the individual's service after consideration of the circumstances in the particular case and the pertinent criteria. E. That great care should be used to insure that the claim is sincere so that the procedure is not abused and in making this determination the claim should be judged by the same standard as is used in judging a pre-induction claim. F. That the standards used by the Selective Service System in determining I-O or I-A-O classification of draft registrants prior to induction are considered appropriate for judging the conscientious objector claims of those who are already members of the armed forces. G. That in order to insure the maximum practicable uniformity among the services and between members of the same service, an advisory opinion of the Selective Service that an I-O classification is appropriate will normally be a requisite for discharge based on conscientious objection of persons who have served less than two years of active service.

Part IV of the directive sets forth some guidelines as to the criteria to be used in evaluating the claim and emphasizes the point that the objection must be religious. It states that affiliation with particular groups does not result in automatic classification and that lack of such affiliation

does not preclude conscientious objector status. It also recognizes that there are no absolute objective measurements which can be applied across the board.

Part V of the directive sets forth the procedure to be employed. Paragraphs C. and D. under this part contain the provisions applicable to the instant case. They provide in pertinent part that a person requesting discharge because of conscientious objection is required to furnish certain information deemed appropriate by the military department concerned and, in addition, may submit other information he deems appropriate. These materials together with other information supplied by the applicant's immediate command are then forwarded to the departmental headquarters for determination. Before the departmental headquarters makes a determination concerning the discharge of persons who have actively served for less than two years, the case is forwarded to the Director of the Selective Service System for an advisory opinion as to the applicant's proper classification under the Universal Military Training and Service Act. If a classification of I-O is recommended the person will be considered for discharge. If a classification of I-A-O is recommended, discharge will not be granted, but the individual will be considered for assignment to non-combatant duties. Persons for whom neither of the above classifications is recommended will normally be retained in military service, subject to normal duty assignments. If the individual who has been denied discharge demonstrates continued unwillingness to serve, he will be subject to disciplinary action just as any other member of the armed forces who demonstrates similar behavior. Paragraph F. provides that

determination by the military department, in accordance with the facts of the case and the guidelines, shall be final with respect to the administrative separation of its members.

Following the issuance of DOD 1300.6, Army Regulation 635-20 was promulgated by order of the Secretary of the Army pursuant to his authority under 10 U.S.C. § 3012 and 10 U.S.C. § 3811. This regulation contains most of the information embodied in DOD 1300.6 and under part 4 sets out the information required of the applicant on his DA Form 1049. In addition it provides that the individual requesting discharge will receive a counseling interview by a chaplain and psychiatric interview with a psychiatrist. The chaplain is to report on the sincerity of the individual's belief and whether it is religious. The psychiatrist's report passes on whether there is anything to indicate the need of disposition through medical channels. These reports and the information supplied by the applicant are forwarded through military channels to the Adjutant General, together with certain comments thereon by the unit commander including his recommendation and reasons therefor. It is the Adjutant General who effects coordination with the Selective Service System.

Part 5 of AR 635-20 provides that the individual requesting discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum of conflict with his professed beliefs pending a final decision in his application.

Private Brown followed the procedures outlined in DOD 1300.6 and AR 635-20. In addition to submitting the required information he also had information submitted on

his behalf by various people including the Methodist Chaplain and Assistant Methodist Chaplain at Yale University; a minister who was on the staff at the Wesley Foundation at Yale University; the pastor of the First Methodist Church, New Haven, Connecticut; and Private Brown's wife. This information, together with information supplied by various military personnel was submitted to the Adjutant General who then forwarded it to the Director of the Selective Service System. The Director's advisory opinion was that Private Brown would not be properly classified in I-O or I-A-O if he were being considered for induction. Subsequent to this evaluation the Adjutant General denied the application for discharge and found that Brown should be "retained on active duty without assignment limitations to complete his obligated period of service. . . ."

Brown was then ordered to draw combat equipment. He refused and charges were preferred against him under 10 U.S.C. § 891. On October 15, 1966, he was tried and convicted by Special Court-Martial and sentenced to three months confinement at hard labor. This sentence was suspended on the same day by the reviewing authority. On October 17, 1966, Brown was again ordered to draw combat equipment. He again refused and charges were preferred under 10 U.S.C. § 890. A pre-trial investigation was conducted pursuant to 10 U.S.C. § 832 and it was decided that instead of holding a second court-martial, the suspension of the first sentence should be vacated and Private Brown was ordered into confinement on November 16, 1966.

On November 29, 1966, a petition for a writ of habeas corpus was filed with this court under 28 U.S.C. § 2241,

naming as respondents the Honorable Robert S. McNamara, Secretary of Defense; Honorable Stanley R. Resor, Secretary of the Army; and Major General John M. Hightower, Commanding General, U. S. Army Training Center, Infantry, U. S. Army, Fort Dix, New Jersey. It is petitioner's contention that he is being held in violation of his rights in that (a) denial of his application for discharge was in violation of 50 U.S.C. App. § 456(j), DOD 1300.6, and AR 635-20; (b) denial of his application for discharge was in violation of the due process clause of the fifth amendment because it was arbitrary and without any basis in fact; (c) denial of his application for discharge was in violation of the due process clause of the fifth amendment because no hearing was held and no reason for the denial of discharge was given; (d) denial of his application for discharge was a violation of equal protection of laws because he was not given the hearing rights accorded those seeking conscientious objector status prior to entering the armed forces and this differential treatment is without rational basis. We signed an Order to Show Cause on November 29, 1966.

Certain individuals have firm and sincere religious beliefs which make them conscientiously opposed to participation in the armed forces. Although not constitutionally compelled, recognition has been given to these beliefs in the form of an exemption from military training and service. See 50 U.S.C. App. § 456(j). This statutory exemption is a matter of legislative grace and has long been recognized as such. See, e.g., *Fleming* v. *United States,* 344 F. 2d 912, 915 (10th Cir. 1965); *Clark* v. *United States,* 236 F. 2d 13, 23 (9th Cir.), *cert. denied,* 352 U.S. 882 (1956); *United*

States v. *Kenstler,* 250 F. Supp. 833, 834 (W.D. Pa. 1966).

If an individual is denied an exempt classification by his local board the statute gives him a right to appeal the denial to a board of appeals. After this appeal the registrant has no further administrative appeal and cannot directly attack the classification in court. If he still feels that his classification is incorrect his recourse is to refuse to submit to induction and then assert the allegedly improper classification as a defense in a criminal prosecution, see *Dickinson* v. *United States,* 346 U.S. 389 (1953); *Estep* v. *United States,* 327 U.S. 114 (1946); or to bring a habeas corpus action after he has been called for service and inducted. *Cf. Orloff* v. *Willoughby,* 345 U.S. 83 (1953); *Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir. 1951). In either case the scope of judicial review is limited to a determination of whether there is any basis in fact for the classification. See *Estep* v. *United States,* 327 U.S. 114 (1946). The procedures provided by 50 U.S.C. App. § 456(j) apply only to the classification process for those who have not yet been inducted into the armed forces. Thus, petitioner, who voluntarily enlisted in the Army, does not come within its provisions.

However, in furtherance of the national policy given expression in 50 U.S.C. App. § 456(j), the Department of Defense has seen fit to provide a procedure for evaluating the claims of members of the armed forces who, after induction, have developed religious beliefs which make them conscientiously opposed to participation in the armed services or combatant aspects thereof. The procedure is set forth in DOD 1300.6 which is an executive directive rather than a congressional mandate. Like the statute relating to

pre-induction classification, the directive in question here is not the result of constitutional compulsion.

With this as a background, we will deal with the contention that the lack of a hearing in the post-induction procedure denied petitioner equal protection because pre-induction applicants are given this right. Our answer to this is that the necessity of the armed services to order and control those already within its operation is a sufficiently rational basis for such a distinction. As the Court recognized in *Burns* v. *Wilson,* 346 U.S. 137, 139-40 (1953), the rights of members of the armed forces are not always as great as those of civilians because "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . ." In fact, the basis for affording differential treatment is so compelling that we feel that the Secretary of Defense could, without violating any constitutional rights, totally deny a procedure for dealing with the claims of "conscientious objectors" who have been properly inducted into the armed forces. Thus, we are unable to conclude that there has been a violation here merely because no hearing is required. See also *In re Kanewske,* 260 F. Supp. 521, 523 (N.D. Cal. 1966).

However, even though the Constitution does not require a procedure whereby post-induction conscientious objectors can have their claims passed upon, once such a procedure is established and put into operation it must be administered in a manner which provides equal protection of laws[1] to all those to whom it is open. *Cf. Griffin* v. *Illinois,*

[1] See *Bolling* v. *Sharpe,* 347 U. S. 497 (1954) which appears to incorporate the equal protection clause into the fifth amendment.

351 U.S. 12, 18 (1956). Our review of the procedural aspects of the directive and implementing regulation compels us to conclude that it is designed to assure the maximum of uniformity of treatment of those covered. Determinations are made at departmental headquarters after the applicant is given the opportunity to submit whatever information he desires. The determination is made only after the Director of Selective Service evaluates the materials and gives an advisory opinion.[2] The procedure thus provides a centralized system removed from local prejudices and interpretations. We feel that the insulation provided by this procedure assures a high degree of equal protection. We thus conclude that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation.

In the instant case the prescribed procedures were followed and it was determined that petitioner was not entitled to either I-O or I-A-O classification. We are now asked to review this determination, it being alleged that it was arbitrary and without basis in fact.

We are dealing here with matters within the control of the Secretary of the Army. Article I, § 8, cl. 14 of our Constitution provides that the President shall be the Commander in Chief of the Army and Navy of the United States and that Congress shall have power to make rules for the government and regulations of the land and naval forces.

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[2] It should be noted that the implementation of this advisory opinion technique coupled with employing the standards used by the Selective Service in making pre-induction classifications also affords substantial uniformity between the determination relating to the pre- and post-induction applicant for conscientious objector status.

To a large extent this power has been delegated to the executive branch. Section 3012 of 10 U.S.C. gives the Secretary of the Army broad authority and responsibility with respect to the conduct of the affairs of the Army and in particular his power to discharge enlisted members of the Army before their term of services expires is expressly granted in section 3811(b) of 10 U.S.C.

The administrative scheme with which we are dealing is designed to create a minimum of disruption of the internal affairs of the Army,—the decision of the departmental headquarters is final. The matter is thus expeditiously handled and during the pendency of the proceedings the applicant is reassigned to duties providing a minimum of conflict with his professed beliefs. If discharge or assignment to non-combatant service is denied, he is then returned to normal service and treated like other members of the military.

It is our belief that this is where the matter should end. It should not be prolonged by bringing the controversy into the courts of law. *Cf. Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 305 (1943). In arriving at the decision of whether to accept jurisdiction, we feel that the effect on the military of judicial involvement in the administrative scheme is a very relevant consideration. Acceptance by us of jurisdiction to review the factual basis of the administrative determination could seriously disrupt the internal operations of the military. By the time the matter was reviewed by us and disposed of on appeal an additional year would ensue before "final" determination. However, without review by the judiciary the military can render a "final" decision within a relatively short period of time.

Under the present scheme during the pendency of the administrative determination the military tries to assign the applicant to a non-combatant job. If we were to accept jurisdiction, would the military be expected to set this man aside for the additional time which it takes for his case to move through the courts?[3] The question causes us great concern. The reason that we are so concerned with the status of the applicant while his case is pending relates to the very nature of the claim of conscientious objection. It appears to us that it will be very difficult for the military to effectively integrate these applicants into any form of combatant training or service while their cases are still being acted upon. It is likely that these applicants will face court martials rather than comply with orders, so they will be able to reinforce the evidence as to the sincerity of their beliefs and their entitlement to discharge or reassignment.[4]

We do not wish to foster a situation which results in having part of what is supposed to be our active force immobile and entangled in litigation. How can the military efficiently devote its facilities and personnel to training a military unit if it cannot rely on those who have been properly inducted and are subject to its control? It is one thing for the courts to be in the middle of the thicket on the issue of pre-induction classification and on the issue of whether the proper form of discharge has been granted.

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[3] Admittedly, they are able to absorb those who have been classified I-A-O and assigned to non-combatant service, but in those cases the man has already proved that he is entitled to the classification.

[4] While they may continue even after their cases are final, we do not feel that it will occur with as much frequency.

Such litigation at the beginning and end of the military term of service is not nearly as disruptive to the function of the armed services as that which threatens the very utilization of the manpower which has been assembled for active service.

In those cases in which the courts have accepted jurisdiction to review matters relating to persons already in the military the question involved something more than whether the factual determination was valid. In *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), the question was whether induction was valid, and in *Harmon* v. *Brucker*, 355 U.S. 579 (1958), the question was whether the military was acting within its statutory authority. In our case the petitioner has been properly inducted and it is not alleged that the procedure used was in excess of statutory power. We are asked here merely to determine if there is any basis in fact for the determination which was made by the adjutant general. Even this narrow scope of review could result in the disruption of military operations discussed above. It is our feeling that the benefits to be derived from the added safeguard of having us review the administrative determination are outweighed by the burdens on the military which would result. Consequently, we refuse to accept jurisdiction to pass on the factual adequacy of administrative decision.

Although jurisdiction to review administrative findings is not always spoken of in terms of the burden-benefit analysis, the statement by the Supreme Court in *Orloff* v. *Willoughby, supra* at 93-94 is just another way of enunciating it. There the Court stated:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Judge Prettyman in *Harmon* v. *Brucker*, 243 F. 2d 613, 619 (D.C. Cir. 1957), *rev'd on other grounds*, 355 U.S. 579 (1958), chose to express this idea in terms of the separation of powers:

> "Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very essence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area."

However our denial of jurisdiction is stated, the result is the same,—the determination of the adjutant general is final and is binding on the petitioner. Consequently, petitioner's retention in the Army and his detention pursuant to the Special Court-Martial are lawful and therefore he is not entitled to relief by way of habeas corpus.[5]

[5] We do not pass judgment on the reason employed in *Petition of Green,* 156 F. Supp. 174 (S. D. Cal. 1957), and the cases cited therein which would also support the result we reach.

50 U. S. C. §456(j)

SECTION 6(j), UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-

471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix].

Department of Defense Directive 1300.6

August 21, 1962
NUMBER 1300.6
ASD(M)

DEPARTMENT OF DEFENSE DIRECTIVE

(Italicizing in text added)

SUBJECT Utilization of Conscientious Objectors and Procedures for Processing Requests for Discharge Based on Conscientious Objection

I. PURPOSE

This Directive establishes uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection.

II. APPLICABILITY

The policies and procedures set forth herein apply to all personnel of the Army, Navy, Air Force and Marine Corps and to all Reserve components thereof.

III. POLICY

A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the

service concerned, based on judgment of the facts and circumstances in the case.

B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection to participation in war, in any form, to the extent that such an objector (1-O classification) is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a prescribed Alternate Service Plan (Conscientious Objectors' Work Program). Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable.

C. Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. *Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selec-*

tive Service prior to induction cannot be entertained.

D. It is the policy of the Department of Defense that requests for discharge from the military service on the grounds of conscientious objection will be handled on an individual basis, with final determination made at the departmental headquarters of the individual's service in accordance with the facts and circumstances in the particular case and the criteria of this Directive. The type of discharge, if separation is deemed warranted, will be determined by the individual's military record, the standards set forth in reference (a), and the procedural guidelines herein.

E. In evaluating requests for discharge based on conscientious objection, great care must be exercised to insure the sincerity of the claim. It is essential that discharge procedures of the services not invite or permit abuse by unscrupulous persons who seek to avoid all obligations on the grounds of religious belief. Claims of conscientious objection by all persons, whether existing before or after entering military service should be judged by the same standards.

F. The standards used by the Selective Service System in determining 1-O or 1-A-O classification of draft registrants prior to induction are considered appropriate for application to cases of servicemen who claim conscientious objection after entering

military service. 1-A-O classification permits induction into the military service and the inductee is required to perform duties as outlined in Section V. A. of this Directive. I-O classification does not permit induction into military service but does permit induction into the Alternate Service Plan (Conscientious Objectors' Work Program). In either of the classifications the registrant is required to fulfill his obligations under the UMT&S Act.

G. In order to insure the maximum practicable uniformity among the services and between members of the same service, *advisory opinion by the Selective Service that a classification of 1-O is appropriate will normally be a requisite for discharge or release of members with less than two years active service* based on conscientious objection.

IV. CRITERIA

A. The criteria for determining conscientious objection (other than the statutory requirement that the objection be religious, as opposed to personal or philosophical) are not absolute objective measurements which can be applied across the board, but are the result of extensive experience and practices which have been upheld in the Courts in connection with legal obligations for service. *Among the factors considered are such items as*

#First amendment (Ch. 1, 8/30/62)

membership in a peace church, training in home and church, the general demeanor and pattern of conduct of the individual, his employment in defense-connected activities, his participation in religious activities, and his credibility and the credibility of persons supporting his claim. In the case of servicemen not liable for induction after discharge because of having served 180 days or more, the individual's willingness to engage voluntarily in post-military work of the nature encompassed by the Alternate Service Plan of Selective Service may also be pertinent.

B. *While church membership and church tenets are relevant in determining conscientious objection, they are not compelling.* The courts have held that mere membership in a religious group teaching conscientious objection is not an automatic basis for classification as a conscientious objector nor does membership in a group which does not require conscientious objection constitute an automatic basis for denying such classification. *The law does not require affiliation with any particular group in order that an individual may be classified as a conscientious objector.*

C. Evaluation of the sincerity of a claim of conscientious objection requires objective consideration of professed belief not generally shared by persons in the military service. For that reason, particular care must be exercised not to deny

bona fide convictions solely on the basis that the professed belief is incompatible with one's own.

V. PROCEDURE

A. 1. Individuals inducted into the Service who have previously been classified as 1-A-O by local induction boards should be assigned to noncombatant service, which in accordance with the President's Executive Order No. 10028, dated January 13, 1949, is defined as:

(a) service in any unit of the armed forces which is unarmed at all times;

(b) service in the medical department of any of the armed forces, wherever performed; or

(c) any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

"The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."

2. Such persons, upon induction into the Service, shall be transferred to a training center, or station, for recruit training and shall be sub-

#First amendment (Ch. 1, 8/30/62)

ject to all regular training, except the portions thereof specifically excepted by Executive Order No. 10028 quoted in A.1, above. Thereafter, upon completion of recruit training, they shall be transferred to Hospital Corps, or Medical Department, for further training, provided they meet the requirements therefor. Such men, because of assignment to medical units will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the medical organization. Any man who does not meet the requirements for this training, or who fails to complete the course, will be retained in the service and employed in noncombatant duties.

B. Personnel who claim to be conscientious objectors and state that they were so classified by their local board but their records do not so indicate:

1. The Commanding Officer shall obtain a statement from the individual concerned and refer the case to the departmental headquarters of the individual's service for investigation and decision. The departmental headquarters will investigate the matter through Selective Service.

2. If it is determined that the man should have been classified as 1-A-O, but inadvertently was not so classified, the records will be corrected;

and the Commanding Officer will be directed to correct his records accordingly. The man then will be processed as indicated in V. A. above.

3. If it is determined that no change in classification is warranted, the individual will be notified to this effect.

4. *Upon first referring of the case, pending its decision, the individual should be retained at his command and employed in noncombatant duties.*

C. 1. Individuals requesting discharge for conscientious objection will submit information as required in Inclosure 1 and such other documentation of their cases as is deemed appropriate by the military department concerned. In order to preserve the maximum practicable uniformity of treatment for like cases, requests and supporting papers will be forwarded, together with any other pertinent information known to the immediate command, to departmental headquarters for individual determination of action on the basis of the facts and the special circumstances of each case.

2. Immediately upon receipt of a request for discharge on grounds of conscientious objection, the member will be fully advised and counselled concerning the provisions of Section

3103, Title 38, United States Code. That section provides, in pertinent part, that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counselling, the member will be required to sign and date the statement appended hereto as Inclosure 2.

3. Before making a determination concerning a possible discharge for conscientious objection in cases falling within the terms of Section III.G., *the military department concerned will forward each case to the Director, Selective System, Washington 25, D. C., for an advisory opinion* as to the individual's proper classification under the UMT&S Act. At the discretion of the military department concerned, advisory opinions may also be sought on members with two or more years service.

D. 1. Individuals for whom 1-O classification is recommended by Selective Service will be con-

sidered for discharge by reason of their conscientious objection to military service.

2. Individuals for whom 1-A-O classification is recommended normally will not be considered for discharge for conscientious objection reasons, but will be reassigned to noncombatant duties as outlined in Section V. A. of this Directive. Individuals so reassigned will be required to sign and date the statement appended hereto as Inclosure 3.

3. Individuals for whom neither 1-O nor 1-A-O classification is recommended by Selective Service will normally be retained in military service, subject to normal duty assignments.

4. If, in the judgment of the commander concerned, any individual reassigned to noncombatant duties or returned to his normal duty assignment demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, action will be taken as in the case of any other member of the military service who demonstrates similar behavior.

E. 1. Individuals for whom 1-O classification is recommended by Selective Service will normally be discharged "For the Convenience of the Government." Conscientious objection will be

cited as the supporting reason in order to avoid possible future confusion. Pending separation, the individual will be assigned duties providing the minimum conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.

2. *Personnel* with less than 180 days service (volunteers or inductees) who are determined to be bona fide conscientious objectors (1-O classification) and *whose request for separation is made early enough so that discharge occurs prior to completion of 180 days active duty will be separated for the convenience of the government by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. In such cases, the Selective Service System will be promptly notified of the date of discharge from the military service, the fact that the individual has not completed 180 days active duty, and will be requested to "induct" the individuals for the alternate service provided by the UMT&S Act.*

F. Determination by the military department, in accordance with the facts of the case and the guidelines furnished herein, shall be final with respect to the administrative separation of its members.

VI. IMPLEMENTATION AND EFFECTIVE DATE

A. All service regulations and policies in conflict with this Directive shall be cancelled immediately. Three copies of regulations implementing the policies contained herein will be furnished to the Assistant Secretary of Defense (Manpower) within 90 days from the date of publication of this Directive.

B. This Directive is effective immediately.

/s/ Roswell Gilpatric
Deputy Secretary of Defense
Aug 21, 62
1300.6 (Incl 1)

Required Information

Each person seeking release from active service from the Armed Forces, as a conscientious objector, will provide the information indicated below as the minimum required for consideration of his request. This in no way bars the Military Departments from requiring additional information as they desire. The individual may submit such other information as desired.

A. General Information

1. Full name.
2. Military Serial Number.
3. Selective Service Number.
4. Service Address.

5. Permanent Home Address.

6. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

7. Give a chronological list of all occupations, positions, jobs, or type of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer and the from/to date for each position or job held.

8. Give all addresses and dates of residence where you have formerly lived.

9. Give the name and address of your parents and indicate whether they are living or deceased.

10. State the religious denomination or sect of your father and mother.

11. Did you apply to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

12. If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes—— No ——. Will you consent to the issuance of an order for such work by your Local Selective Service Board? Yes —— No ——.

Department of Defense Directive 1300.6

B. Religious Training and Belief.

1. Do you believe in a Supreme Being?

2. Describe the nature of your belief which is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

5. Under what circumstances, if any, do you believe in the use of force?

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrates the consistency and depth of your religious convictions.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

C. Participation in Organizations.

1. Have you ever been a member of any military organization or establishment before entering the Armed Forces for this tour? If so, state the name and address of same and give reasons why you became a member.

2. Are you a member of a religious sect or organization? If your reply is "yes":—

a. State the name of the sect, and the name and location of its governing body or head if known to you.

b. When, where, and how did you become a member of said sect or organization?

c. State the name and location of the church, congregation, or meeting where you customarily attend.

d. Give the name, title, and present address of the pastor or leader of such church, congregation or meeting.

e. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

D. References.

1. Give the name, full address, occupation or position, and relationship to you, concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

[One of the following (Incl 2) or (Incl 3) to be signed by applicant. Ed.]

Aug 21, 62
1300.6 (Incl 2)

Department of Defense Directive 1300.6

STATEMENT

I have been counselled concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector, who refuses to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority, may bar all rights, based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, government (converted) or National Service Life Insurance.

Aug 21, 62
1300.6 (Incl 3)

STATEMENT

I have been counselled concerning designation as a conscientious objector. Based on my religious training and belief, I consider myself to be a conscientious objector and am conscientiously opposed to participation in combatant training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service I am not eligible for voluntary enlistment, reenlistment, or active service in the Armed Forces.

ARMY REGULATION
No. 635-20

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., *5 January 1966*

PERSONNEL SEPARATIONS

CONSCIENTIOUS OBJECTION

	Paragraph
Purpose	1
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1. Purpose. This regulation sets forth the policy, criteria, and procedures for disposition of military personnel who, by reason of religious training and belief, claim conscientious objection to participation in war in any form.

2. Scope. This regulation applies equally to commissioned officers, warrant officers, and enlisted personnel in the active military service.

3. Policy. *a.* Consideration will be given to requests for separation based on conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service.

b. Requests for discharge will not be entertained when based solely on conscientious objection which existed, but which was not claimed prior to induction, enlistment, or entry on active duty or active duty for training. Similarly, requests for discharge will not be entertained when based solely on conscientious objection claimed and denied by the Selective Service prior to induction.

c. All requests for discharge based on conscientious objection will be considered on an individual basis in accordance with the facts and special circumstances in a particular case.

d. Final determination will be made at Headquarters, Department of the Army, on all requests for discharge based on conscientious objection.

4. Procedure. *a.* Military personnel will submit applications for discharge by reason of conscientious objection on DA Form 1049 (Personnel Action) to their immediate commanding officers. The individual requesting discharge will include in his application or as an inclosure thereto the information indicated below as the minimum required for consideration of his request. The individual may submit such other information as desired.

(1) General information.
- (*a*) Full name.
- (*b*) Military service number.
- (*c*) Selective service number.
- (*d*) Service address.
- (*e*) Permanent home address.
- (*f*) Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).
- (*g*) Give a chronological list of all occupations, positions, jobs, or type of work other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer, and the from/to date for each position or job held.
- (*h*) Give all addresses and dates of residence where you have formerly lived.
- (*i*) Give the name and address of your parents and indicate whether they are living or deceased.
- (*j*) State the religious denomination of sect of your father and mother.
- (*k*) Did you apply to the Selective Service System (Local Board) for classification as a conscientious objector prior

*This regulation supersedes AR 635-20, 9 November 1962, and rescinds DA message 742770, 4 December 1965.

to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

(*l*) If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes ____ No ____. Will you consent to the issuance of an order for such work by your Local Selective Service Board? Yes ____ No ____.

(2) Religious training and belief.

(*a*) Do you believe in a Supreme Being?

(*b*) Describe the nature of your belief that is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties that to you are superior to those arising from any human relation.

(*c*) Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim.

(*d*) Give the name and present address of the individual upon whom you rely most for religious guidance.

(*e*) Under what circumstances, if any, do you believe in the use of force?

(*f*) Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

(*g*) Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

(3) Participation in organizations.

(*a*) Have you ever been a member of any military organization or establishment before entering the Armed Forces for this tour? If so, state the name and address of same and give reasons why you became a member.

(*b*) Are you a member of a religious sect or organization? If your reply is "yes"—

1. State the name of the sect, and the name and location of its governing body or head if known to you.

2. When, where, and how did you become a member of said sect or organization.

3. State the name and location of the church, congregation, or meeting where you customarily attend.

4. Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

5. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

(*c*) Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

(4) References. Give the name, full address, occupation or position, and relationship to you, concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

b. Immediately upon receipt of a request for discharge on the grounds of conscientious objection, the individual's commanding officer will fully advise and counsel him concerning the provisions of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the discharge of a person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, will bar all rights (except Government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in the cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counseling, the member will be required to sign and date the following statement:

I have been counseled concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector who refuses to perform satisfac-

tory military duty or otherwise to comply with lawful orders of competent military authority may bar all rights based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance.

c. An individual requesting discharge will receive a counseling interview by a chaplain and a psychiatric interview by a psychiatrist (or medical officer if a psychiatrist is not available). The chaplain will submit a report of the interview to include the sincerity of the individual in his belief and an opinion as to whether the individual's objection to military duty is based on his religious beliefs. The psychiatrist will submit a report of psychiatric evaluation indicating the presence or absence of any psychiatric disorder which would warrant treatment or disposition through medical channels.

d. The application for discharge, together with the inclosure(s), and reports of interviews, will be forwarded through military channels to The Adjutant General, ATTN: AGPO, Department of the Army, Washington, D.C., 20315.

(1) The comment by unit commander on DA Form 1049 will include the following information:

(*a*) Whether approval or disapproval is recommended. The reason(s) therefor will be included.

(*b*) Duty and primary MOS (enlisted personnel only).

(*c*) Whether medical board or physical evaluation board proceedings are pending or appropriate.

(*d*) Whether under investigation, under charges, awaiting result of trial, absent without leave, or whether any flagging action has been taken in accordance with AR 600–31.

(2) Subsequent forwarding comments on DA Form 1049 will include recommendation for approval or disapproval and any other remarks that may be pertinent.

[AGPO]

e. The Adjutant General, Department of the Army, will coordinate with the Selective Service System.

5. Assignment. An individual requesting discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum conflict with his professed beliefs pending a final decision on his application.

6. Discharge of personnel having less than 180 days service. Personnel who have less than 180 days service when discharged will be discharged by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. National Headquarters, Selective Service System, 451 Indiana Avenue NW., Washington, D.C., 20435, will be notified promptly of date of discharge from military service; advised that the individual has not completed 180 days active duty, and requested to induct the individual into the Selective Service Conscientious Objectors' Work Program.

7. Authority. *a. Commissioned officers and warrant officers.* Authority AR 635–20 and SPN 558 for separation will be included in orders announcing discharge of individuals.

b. Enlisted personnel. Authority AR 635–20 and SPN 318 for discharge will be included in directives or orders directing individuals to report to the appropriate transfer activity or unit personnel section designated to accomplish transfer processing for discharge.

8. Form of separation certificates. *a. Discharge.* An Honorable Discharge Certificate (DD Form 256A) or a General Discharge Certificate (DD Form 257A) will be furnished. Commissioned officers and warrant officers will be furnished a discharge certificate in accordance with AR 635–5 or as directed by Headquarters, Department of the Army. Enlisted personnel will be furnished a discharge certificate in accordance with AR 635–200.

b. Report of separation. Armed Forces of the United States Report of Transfer or Discharge (DD Form 214) will be furnished each individual discharged from service under this regulation.

By Order of the Secretary of the Army:

HAROLD K. JOHNSON,
General, United States Army,
Chief of Staff.

Official:
J. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

Distribution:
To be distributed in accordance with DA Form 12–9 requirements for Military Personnel Procedures, Officer and Enlisted:
Active Army: A. *NG:* D. *USAR:* None.

TAGO 1025A
U.S. GOVERNMENT PRINTING OFFICE: 1966

New York Times Article

The New York Times
June 17, 1967, p. 13, col. 7

PENTAGON SCORED OVER OBJECTORS

3 Groups Charge Services Are Denying Discharges

Three organizations active on behalf of conscientious objectors charged yesterday that the armed services, in defiance of Defense Department regulations, were denying discharge or reassignment to all conscientious objectors in uniform.

The organizations are the American Civil Liberties Union, the Central Committee for Conscientious Objectors and the National Council of Churches. They held a news conference at the liberties union's headquarters, 156 Fifth Avenue, to protest the situation.

Arlo Tatum, director of the central committee, a counseling agency set up by peace and pacifist groups, said that in 1964 the services granted 80 per cent of applications by men in uniform for discharge or reassignment on the ground of conscientious objection, but in 1965 granted 4 per cent.

"Since May, 1966," he said, "not a single application, as far as we can ascertain, has been granted."

Both he and John deJ. Pemberton Jr., executive director of the liberties union, said that in the last 18 months there were 750 pending cases of applicants for conscientious objector discharges and not one was granted.

"We do not maintain that all these applications are valid cases, but we do insist that it is absolutely impossible that none is," Mr. Pemberton said.

New York Times Article

Court Ruling Recalled

The Rev. Dean M. Kelly, government relations director of the National Council of Churches, said his 250-member general board felt that if a man's conscience was awakened by experience and caused him to develop conscientious objection to war, his previous willingness to undertake military service should not be prejudicial to him.

Mr. Pemberton recalled the Supreme Court had ruled that a conscientious objector did not need to be affiliated with one of the traditional pacifist churches or hold an orthodox belief in God to avail himself of the legal right to respect for his stand. Since then, the Defense Department has issued Directive 1300.6, which permits discharge or reassignment of members of the armed forces who develop conscientious objection to war, he said.

Mr. Tatum said the services were acting "in callous disregard of the directive, the law and the moral values on which our society was founded." Mr. Pemberton said such a position was "demeaning to the services."

Mr. Tatum said that the burden of proof that an objection was valid and not a subterfuge was on the applicant. The applicant is usually examined by his chaplain, his psychiatrist and his commanding officer. In a number of cases, Mr. Tatum said, all three have recommended discharge but it has been denied.

Statement by Pentagon

Special to The New York Times

WASHINGTON, June 16—Pentagon officials would not comment directly today on the three groups' charges, which they had not seen.

New York Times Article

A spokesman for the Department of Defense said he had no statistics yet on reclassification of conscientious objectors in 1966. He said he was certain, however, that some had been approved.

For 1964 the Army reported 62 applications from men who claimed conscientious objector status after entering the armed forces. For 30 of these the change of status and reassignment were approved. In 1965 there were 74 applicants and 23 approvals. For the Air Force the 1964 figures were 17 applications and 12 approvals, while for 1965 there were 18 applications and 12 approvals. No figures were available for the Navy.

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No. 1081

In the Supreme Court of the United States

OCTOBER TERM, 1967

DAVID W. BROWN, PETITIONER

v.

HON. CLARK M. CLIFFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The opinion of the district court (Pet. App. 9a-23a) is reported at 263 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1967. The petition for a writ of certiorari was filed on February 5, 1968. The jur-

isdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures used by the Army to pass upon servicemen's claims for discharge as conscientious objectors comport with due process.

2. Whether the Army's denial of petitioner's application for discharge was arbitrary or capricious.

3. Whether petitioner's resort to the civil courts on habeas corpus is premature in light of the fact that a proceeding in which his conscientious objection claim may be presented is currently pending before an Army Board of Review.

STATEMENT

Petitioner brought this action seeking a writ of habeas corpus ordering his discharge from the Army on the ground that the Army improperly refused to discharge him as a conscientious objector. The United States District Court for the District of New Jersey denied relief and the court of appeals affirmed, one judge dissenting.

The relevant facts show that when petitioner was a twenty year old student at Yale, he voluntarily enlisted in the United States Army for a period of three years, on May 17, 1966. He reported to Fort Dix for active training in the early part of June 1966. After two weeks of basic training, petitioner invoked Army Regulation (AR) 635-20 [1] and sub-

[1] AR 635-20 (Pet. App. 42a-45a) was promulgated by the Army to implement the policy set forth in Department of

mitted an application for discharge as a conscientious objector. In his application, petitioner alleged that he believed in a Supreme Being, and that the belief which prompted his conscientious objector claim derived from both religious and pacifist training. He alleged that his religious training consisted of membership in the Methodist Church [2] and participation in "enumerical [*sic*; ecumenical?] youth activities in high school" (A. 5). He listed pacifist training separately, and set forth that it consisted of "(1) Personal contact with professed pacifists" (A. 5), "(2) Some literature from Sane and the World Federalists" (A. 6), and "(3) Contact with peace groups at Yale" including "Alternative" and "Americans for Reappraisal of Far Eastern Policy" (A. 6). The belief which prompted his conscientious objection application was also derived from his introductory reading of "* * * *Understanding Media; The Extension of Man*; by Marshall MacLuham [*sic*], which indicates new possibilities for and tendencies towards peaceful situations [*sic*; solutions?] to international disputes" (A. 6). Finally, petitioner alleged that his conscientious objection to war

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Defense Directive (DOD) 1300.6 (Pet. App. 26a-41a), dealing with the consideration of conscientious objector claims by persons lawfully inducted into the military services.

[2] As set forth in petitioner's application, the official statement or creed of the Methodist Church recognizes that there will be differences of opinion as to participation in war, and the Church supports the conscientious views of both participant and non-participant (A. 8-9). ("A." designates the Appendix filed by petitioner in the court below, and "H." the hearing on the habeas corpus petition, both of which have been filed with the Clerk of this Court).

in any form fully crystallized in the few weeks following enlistment when basic training gave him a "* * * new awareness of the destructive mission of the Army" (A. 6). Submitted with the application were letters from an Assistant Methodist Chaplain at Yale University, the Chaplain of The Wesley Foundation, petitioner's pastor, petitioner's wife, and some friends, all of whom stated their belief that petitioner's application was motivated by sincere religious conviction (A. 12, 13, 14-15, 16-17, 18-19). Petitioner also tendered the report of the Brigade Chaplain who had interviewed petitioner in accordance with AR 635-20. On the basis of his "extensive counseling" with petitioner, the Chaplain concluded that petitioner's beliefs, "* * * though sincere, are based on contacts he has had with Pacifistic Organizations and individuals rather than on Religious Convictions." (A. 10).

After an interview, petitioner's company commander concluded (A. 28):

> * * * prior to his enlistment into the military service, and since his commencement of basic training, Brown has been subjected to reading numerous papers and pamphlets concerning the "Pacifist Program" currently being demonstrated in this country.
>
> 3. In addition his beliefs are mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs.

On the basis of the Chaplain's report and his own observations, and in accordance with the established procedures, petitioner's company commander then

recommended that the application be disapproved. Petitioner's battalion commander concurred in this recommendation (A. 27), as did his brigade commander (A. 27) and the Base Commander (A. 26). The Commanding General, First Army, joined in recommending disapproval, listing as his ground the conclusion that petitioner's conscientious beliefs had crystallized prior to enlistment, which under AR 635-20, paragraph 3b and Part III. C of DOD 1300.6, made him ineligible to apply for a discharge (A. 25). Thereafter, as required by Department of Defense Directive (DOD) 1300.6, Part V. C (3) (Pet. App. 34), the Secretary of the Army forwarded petitioner's application and personnel file to the Director of the Selective Service System for an advisory opinion concerning his proper classification.[3] The Director advised that petitioner would not be classified as a conscientious objector if he were being considered for induction. On or about October 6, 1966, petitioner was notified that the Adjutant-General, in the name of the Secretary of the Army, had rejected his application (A. 24; Pet. 4-5).

On October 7, 1966, petitioner was ordered to draw combat training equipment; when he refused he was charged with failure to obey a lawful order of a noncommissioned officer, in violation of Article 91, Uniform Code of Military Justice (10 U.S.C. 891). Tried and convicted on that charge by a special court-mar-

[3] The advisory opinion is requested in part because of the objective of applying uniform criteria to these claims whether made by civilians or servicemen, and in part because, for those who have served less than 180 days, release from the Army will not relieve them from liability to the draft.

tial, he was sentenced to confinement for three months and forfeiture of $37.00 per month of his pay, but execution of the sentence was suspended. On October 17, petitioner failed to obey a similar order by a commissioned officer in violation of Article 90, Uniform Code of Military Justice (10 U.S.C. 890). Instead of a second court-martial, the suspension of the sentence adjudged by the first court-martial was vacated and petitioner entered confinement on November 16, 1966.[4]

On November 29, 1966, petitioner filed a petition for a writ of habeas corpus alleging, *inter alia*, that the denial of his application for a discharge as a conscientious objector was in violation of the relevant provisions of the Universal Military Training and Service Act, the Department of Defense Directive, and the Army Regulations (50 App. U.S.C. 456(j), DOD 1300.6 and AR 635-20); that the Army's determination also violated due process because it was arbitrary and without any basis in fact; that it violated due process because petitioner was not afforded an opportunity for a hearing and was not advised of the grounds upon which his application was denied; and that he was denied equal protection because the procedure used by the Army in processing conscientious objector claims irrationally omitted hearing rights accorded by the Selective Service System in passing upon pre-induction claims.[5]

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[4] During the pendency of the instant proceedings petitioner violated a third order and was sentenced to imprisonment for 18 months at Fort Leavenworth, Kansas.

[5] We are lodging a copy of the petition for a writ of habeas corpus with the Clerk of this Court.

On January 31, 1967, the district court denied the application for the writ. The court denied petitioner's procedural claims on the merits, concluding that while the procedures used by the Army to process such claims by military personnel—the procedures followed in this case—were not the same as the statutory procedures followed by the Selective Service System in processing civilian claims, the difference was reasonably justified by the peculiar needs of military order and discipline. *Brown* v. *McNamara*, 263 F. Supp. 686, 691; Pet. App. 17a-18a. The court declined, however, to review the factual adequacy of the Secretary's determination that petitioner did not qualify for the exemption. It reasoned that any added safeguards that would be provided by acceptance of jurisdiction to inquire into such particularized questions were "outweighed by the burden on the military which would result". Because of the Army's policy of assigning an applicant to non-combatant duties pending final action on his conscientious objector claim, the court concluded that protracted judicial litigation "could seriously disrupt the internal operations of the military" by keeping "part of what is supposed to be our active force immobile and entangled in litigation." 263 F. Supp. at 692; Pet. App. 19a-21a.

On appeal, Judge Van Dusen, writing the opinion of the court (Pet. App. 1a-6a), agreed with the district court on the due process question, but held that a federal court has jurisdiction to review the validity of the Army's denial of a conscientious objector claim,

at least to the limited extent of determining whether the denial was arbitrary, capricious or irrational. On the substantive merits, he concluded that there was "sufficient evidence" that the Army had not acted arbitrarily in refusing to discharge petitioner. He noted several factors (Pet. App. 5a-6a): (1) that the advisory opinion of the Director of Selective Service stated that the system would not recognize petitioner as a conscientious objector; (2) that the service regulations do not guarantee that even acceptance of a conscientious objector claim will result in discharge, since such claims will be recognized only "to the extent practicable and equitable", and will be denied automatically if the conscientious objection existed before entry into the Army;[6] (3) that petitioner first raised his claim six weeks after his voluntary enlistment in the Army and two weeks after the commencement of basic training; and (4) that there was "affirmative evidence" indicating that petitioner's conscientious objection was not based upon religious grounds.[7] Judge Van Dusen concluded that, in this context, there was no reason for the judicial power to interfere with such appellate procedures as may be available to petitioner within the Army (Pet. 6a).

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[6] See DOD 1300.6 (Pet. 26a-27a); AR 635-20 (Pet. App. 42a).

[7] Contrary to the assertions in the petition (Pet. 7, 8), the court below did not purport to rest its decision solely on the ground that petitioner's beliefs were based "in part" on non-religious factors. As indicated in the text, it found that there were various factors which precluded a holding that the determination made by the military authorities was arbitrary.

Chief Judge Staley, in a concurring opinion, agreed that the Army procedures were consistent with due process, but concluded, as had the district court, "that federal courts should refuse to accept subject matter jurisdiction to pass on the factual adequacy of the Army's decision" (Pet. App. 6a-7a). In dissent, Judge Maris agreed with Judge Van Dusen "that the federal courts have power to review the substantive elements of the military proceedings" but was of the view that the Army had made an erroneous assumption that since petitioner's beliefs were based on contacts with pacifist persons or organizations, they were of necessity not "religious beliefs" (Pet. App. 7a-8a).

ARGUMENT

1. Petitioner charges that the "procedures established by AR 635-20 for the processing, evaluation and adjudication of applications for conscientious objector status are totally devoid of minimum standards of due process * * *" (Pet. 12). In determining whether this position has any substance, it is important to view these procedures in the context in which they are used. In this light it becomes apparent that the provisions for protracted hearings and appeals appropriate for resolution of such claims when made by a civilian are unsuited to the consideration of a conscientious objection application by a serviceman on active duty.

We preface these remarks by noting that, unlike the civilian who has a statutory right to exemption if he establishes his conscientious objection claim (*Estep*

v. *United States*, 327 U.S. 114), no statute creates such a right for those already within the military service. The Army procedures here in issue reflect an exercise of Executive discretion. The Department of Defense Directive announcing this policy cautions that no member of the Armed Forces is entitled to be discharged prior to the expiration of his term of service, and that the decision whether to release a soldier who develops conscientious objection to war in any form "is discretionary with the service concerned, based on judgment of the facts and circumstances in the case" (Pet. App. 26a-27a). Thus even "bona fide conscientious objection" by servicemen "will be recognized [only] to the extent practicable and equitable" (Pet. App. 27a).[8]

In establishing the procedures by which the Army will undertake to consider these claims, the Executive was entitled to rely on the settled principle that the organization, administration, and discipline of the military forces are entrusted to the sound discretion of the Commander-in-Chief and his subordinates. As this Court has stated, *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94:

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[8] Notwithstanding petitioner's suggestion to the contrary (Pet. 14-15), it has been consistently held that exemption from military service because of religious scruples is a matter of legislative choice and not a constitutional imperative. See, *e.g.*, *Fleming* v. *United States*, 344 F. 2d 912 (C.A. 10); *Clark* v. *United States*, 236 F. 2d 13 (C.A. 9), certiorari denied, 352 U.S. 882; *United States* v. *Kenstler*, 250 F. Supp. 833, 834 (W.D. Pa.). Certainly, no different rule should be applicable to one who first raises a conscientious objection claim after he has enlisted in the Army.

> * * * judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters. * * *

We do not mean to suggest that any procedural system—no matter how restrictively or unevenly applied—would be within the range of permissible choices by the Executive;[9] we urge only that the validity of the system presently embodied in AR 635-20 should be tested by considerations which take into account the peculiar needs of the military system for which these procedures were designed. In this light—as both courts below ruled—the Army system in issue satisfies due process. An applicant is afforded full opportunity to present the basis of his claim in written form, and to file such other information as he deems pertinent to that claim. Under AR 635-20, paragraph 4c, each applicant is personally interviewed by the Brigade Chaplain, and in the present case petitioner was also interviewed by his company commander. The need to maintain our active military

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[9] By the same token, an exercise of military authority in contravention of an express statutory scheme would not be allowed to stand. *Harmon* v. *Brucker*, 355 U.S. 579 (the Secretary of the Army improperly issued less than an "honorable" discharge in excess of his statutory power).

forces in a state of operational integrity precludes the use of adversary hearings and extensive appellate procedures in determining whether a particular soldier should be released from the service. The delays invariably attendant on processes appropriate in civil litigation warrant different procedures in the military, since the period of the soldier's obligation is limited and the Army assigns him to non-combatant duties while his claim is pending. The absence of a formalized hearing requirement reflects the fact that the conscientious objector discharge procedure applies equally to the soldier on the "front line" and the soldier in basic training. In sum, the formal procedures adopted by the Army gave petitioner the opportunity to make known the basis of his claim and to adduce personal and documentary support for it, while also permitting a fair and expeditious decision to be made without serious disruption of military training and operations.

2. The Court need not reach the broad issue of whether the civil courts should ever assert jurisdiction to re-evaluate the factual basis of the Army's denial of a conscientious objection claim.[10] Assuming, *arguendo*, that there should be such review, the standard of review adopted and applied by Judge Van Dusen in this case—whether the Army's decision was "arbitrary,

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[10] As noted, Judge Staley, in his concurring opinion below, concluded that courts should never exercise reviewing authority on the theory that "the exercise of such jurisdiction has properly been held to be unduly disruptive of the operation of the armed forces, and contrary to the separation of powers" (Pet. App. 7a). The district court came to the same conclusion (see Pet. App. 19a-23a).

or capricious or irrational" (Pet. App. 5a)—surely meets minimal constitutional requirements. Indeed, only a very limited review is available in the case of a challenge by a civilian to a classification by Selective Service authorities. *Estep* v. *United States*, 327 U.S. 114, 122-123.

The basic question to be resolved under such a standard is whether the Army could rationally conclude that petitioner was not entitled to discharge because his convictions pre-dated his enlistment, or did not warrant separation from the service, or were not sincerely based on his personal religious beliefs. Cf. *United States* v. *Seeger*, 380 U.S. 163, 184.[11] We

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[11] The sincerity of the belief is made a crucial element in the Army scheme. See Department of Defense Directive 1300.6, Part III. E (Pet. App. 28a). Moreover, it is entirely clear from the context of the hearing on the habeas corpus petition that the government conceded the sincerity of petitioner's belief only for the purpose of making a jurisdictional argument (see H. 26 *et seq.*).

The petition (Pet. 9) recites that in the district court the government conceded the sincerity of petitioner's belief in a Supreme Being. From this the petition erroneously suggests that the only issue in the case, then, is whether petitioner's "proof of religious training and belief was rebutted by *any* evidence" in the military process. We take issue with this statement; the government's refusal to contest the sincerity of petitioner's general religious beliefs is hardly support for the conclusion that we concede that in fact these beliefs motivated his opposition to war. The issues are more complex than the petition endeavors to make them, for in addition to the question whether there was "any evidence" to support a conclusion that petitioner's pacificism was the result of political and social theories rather than his belief in a Supreme Being, there are also questions of whether his opposition to war—whatever its origin—arose more than a few weeks before he sought discharge and whether it would in any event have been "practicable and equitable" to recognize his claim.

submit, as Judge Van Dusen held (Pet. App. 5a-6a), that there was adequate evidence to lay to rest any claim of arbitrariness. The Brigade Chaplain, after extensive consultation, concluded that petitioner's opposition derived solely from pacifist beliefs, rather than from religious beliefs. Likewise, petitioner's company commander agreed that there was a lack of sincerity in the claim that his objection to war was religiously motivated.[12]

We submit also that the Army was entitled to take into account, in assessing the origin and sincerity of petitioner's claim, that it was alleged to have matured "in light of new awareness of the destructive mission of the Army" (A. 6), after only two weeks of basic training. Moreover, in accord with the Defense Department Directive (D.O.D. 1300.6, Part V. C (3)), an advisory opinion was obtained from the Selective Service System to the effect that petitioner would not be classified as a conscientious objector if he were being considered for induction.[13]

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[12] Petitioner reads the company commander's statement as showing that the denial was based on the fact that petitioner enjoyed pacifist beliefs *as well as* religious beliefs, and argues that the recommendation was thus improper. We think it is clear, as did Judge Van Dusen (Pet. App. 6a), that the purport of the company commander's entire statement was that he disbelieved the sincerity of petitioner's claim that his opposition to war stemmed from religious beliefs.

[13] While Judge Maris apparently agreed that the Army could find that petitioner's opposition to war stemmed from the teachings of pacifist groups and individuals, he nevertheless dissented on the ground that there was no showing that the pacifist groups were not in fact religiously motivated (Pet. App. 7a-8a). Of course pacifists may be motivated by re-

It is also clear from petitioner's own application that all of the religious training to which he referred as responsible for his beliefs occurred prior to his enlistment in the Army. Certainly, in such a case one cannot characterize as irrational the conclusion reached by the military authorities that petitioner did not meet the standard of the regulations.[14]

In sum, Judge Van Dusen properly concluded that there was some "affirmative evidence" (Pet. App. 6a, n. 7) showing the insincerity of petitioner's claim, and showing that the Army's denial was neither arbitrary nor capricious.

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ligious as well as political or social theories, but this abstract possibility does not imply that the handling of petitioner's claim was unfair. We note first that petitioner himself explicitly distinguished his "Religious training" from his "Pacifist training" (A. 5-6). Implicit in Judge Maris' approach is what we submit is the erroneous assumption that the Army had to prove in fact, after obtaining the conclusions of the chaplain and the company commander that petitioner's opposition stemmed from pacifist contacts, that these pacifist groups were not religiously motivated. Apart from whether concepts of official notice would have permitted the Army to conclude that the pacifist groups listed by petitioner—Sane, World Federalists, Alternative, Americans for Reappraisal of Far Eastern Policy (A. 6)—are political action organizations, we suggest that it is not unreasonable to expect an applicant who contends that his contacts with pacifist groups demonstrate that his opposition to war is based on religious convictions should offer some explanation of why he distinguished them from his "Religious Training."

[14] In accord with the policy set forth in Department of Defense Directive 1300.6, Part III. C, AR 635-20, paragraph 3b specifically provides that requests for discharge will not be entertained when based solely on conscientious objection which existed, but which was not claimed, prior to induction, enlistment, or entry on active duty.

3. We also note that an appeal from petitioner's latest court-martial is presently pending before the Army Board of Review. Although counsel for petitioner in that proceeding has not yet filed a specification of errors, there is no authoritative determination, so far as we are aware, that would preclude the argument before the Board that petitioner's conscientious objection claim was erroneously denied and that this circumstance bears on his failure to obey the otherwise lawful order. See *United States* v. *Prendergrass*, U.S.C.M.A., No. 20,514, Feb. 16, 1968. Thus, there is also a serious question as to the ripeness of petitioner's claim to review in the civil courts.[15] As Judge Van Dusen observed, petitioner's claim neither involves such unique factors, nor demonstrates such a miscarriage of justice, as to warrant immediate judicial intervention in face of the availability of further review within the military system.[16]

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[15] We are aware, of course, that a successful presentation of this defense before the Army Board of Review would not automatically entitle petitioner to the full relief he now requests—*i.e.*, discharge from the Army. However, in the event petitioner's defense—that he cannot be compelled to obey any military orders because of his religious scruples—is successful, the Army would have no practical alternative but to grant petitioner a discharge.

[16] The matter of exhaustion of remedies was urged before the district court, but was not considered in light of its position of judicial non-reviewability. (See Pet. App. 23a, n. 5). Neither Chief Judge Staley nor Judge Maris had occasion to refer to the matter in their opinions.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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